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Christopher David Ruiz Cameron

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THE WAGES OF SYNTAX: WHY THE COST OF ORGANIZING A UNION FIRM'S NON-UNION COMPETITION SHOULD BE CHARGED TO 'FINANCIAL CORE' EMPLOYEES

*Christopher David Ruiz Cameron**

While it takes a village to raise a child, it takes a union to get a raise.¹

Old-fashioned union organizing is becoming fashionable again. John J. Sweeney, the president of the AFL-CIO, swept into office during the fall of 1995 on a pledge to save the flagging American labor movement by putting some muscle behind the federation's bumper-sticker slogan that signing up new members is "Priority One." During his first two years in office, Sweeney established a new department-level office to develop organizing strategies,² poured \$30 million into a new organizing fund,³ and trained 250 new full-time union organizers to spread the gospel of collective bargaining to the next generation of American workers.⁴ These measures, Sweeney declared, reflected his desire to create a culture of organizing and to transform the right to organize into "the civil rights issue of the 1990s."⁵

* Professor of Law, Southwestern University School of Law, Los Angeles. A.B. University of California, Los Angeles, 1980; J.D. Harvard Law School, 1983. This project was made possible by the generous financial support of the Trustees of Southwestern University School of Law. Beverlei Colston (Class of 1998) and Matthias Wagener (Class of 1999) provided valuable research assistance. Special thanks are due to Jim Coppess, Joe Grodin, Kevin Johnson, Lew Maltby, George Martinez, and Paula Voos who reviewed early drafts of this Article. Any remaining errors are mine.

1. Robert Shogan, *Liberal Groups See Ample Room for National Shift to the Left*, L.A. TIMES, Oct. 15, 1996, at A5 (quoting AFL-CIO President John Sweeney, who alluded to First Lady Hillary Rodham Clinton's child-rearing book, *It Takes a Village*).

2. See *AFL-CIO to Continue Focus on Organizing*, 154 Lab. Rel. Rep. (BNA) 82, 82 (Jan. 27, 1997).

3. See *id.* This \$30 million figure represented an increase over the \$20 million Sweeney originally promised to invest. See *id.*

4. See *id.* at 83. Sweeney wants the AFL-CIO's Organizing Institute to train a total of 1,000 new organizers by 1998. See Michelle Amber, *More Union Organizing Activity Predicted; Effectiveness Is Questioned by Observers*, Daily Lab. Rep. (BNA) No. 24, at C-1 (Feb. 6, 1996).

5. *Right to Organize Seen as Civil Rights Issue of 1990s*, 155 Lab. Rel. Rep. (BNA) 439, 439 (Aug. 4, 1997).

Sweeney's success—or failure—as head of the House of Labor will depend upon whether the longstanding decline in the private sector unionization rate is reversed on his watch.⁶ After peaking at 38% in 1954,⁷ private, non-agricultural union density fell to 13% in 1993.⁸ Today it is barely 10%.⁹ The task is all the more daunting because of the added difficulty of organizing new employees in the age of the “global village,”¹⁰ where capital can avoid the higher wage costs of unionization by packing up and moving abroad or, in some cases, by clicking a computer mouse to transfer assets there.¹¹ Several years before becoming only the fifth person to lead the 111-year-old labor organization, the vigorous Sweeney himself predicted that, barring a cataclysmic event, organized labor would represent the same fraction of workers at the sunset of the twentieth century as it did at the dawn: just 5%.¹²

6. Labor officials figure it will take time for Sweeney's initiatives to show results. See Amber, *supra* note 4, at C-1 (statement of AFL-CIO Secretary-Treasurer Richard Trumka) (“A turnaround won't take place in the first or second year . . . [but] we will in fact lay the groundwork.”).

7. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1772 n.4 (1983). See generally WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993) (offering a provocative discussion of alternatives to traditional labor unions); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 105-33 (1990) (providing an in-depth discussion of the cause of the decline of the institution of collective bargaining).

8. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Markets*, 69 CHI.-KENT L. REV. 3, 9-10 (1993).

9. See *Data for 1994 Shows Membership Held Steady at 16.7 Million*, 1995 Daily Lab. Rep. (BNA) No. 27, at D-1 (Feb. 9, 1995).

10. MARSHALL H. McLuhan, *THE MEDIUM IS THE MESSAGE* (1967) (“The new electronic interdependence recreates the world in the image of a global village.”).

11. Recognizing the need to reach American capital where it moves abroad, Sweeney has acted to build ties with foreign unions. See *Outlook for Unions Examined During Meeting of Industrial Research Association*, 1997 Daily Lab. Rep. (BNA) No. 77, at A-3 (Apr. 22, 1997) (remarks of Georgia State University Professor Bruce Kaufman). In public statements, other AFL-CIO officials have called for a “strategic action plan” to “begin the steps toward global bargaining and global unionism.” Court Gifford, *Industrial Unions Redirect Energies to Compete in Global Economy*, 1996 Daily Lab. Rep. (BNA) No. 219, at A-11 (Nov. 13, 1996) (joint statement of AFL-CIO Industrial Union Department President Peter diCicco and Secretary-Treasurer Joseph B. Uehlein).

12. See *AFL-CIO Leaders Seek Ways to Boost Union Membership in U.S.*, Daily Lab. Rep. (BNA) No. 221, at A-2 (Nov. 15, 1991) (remarks of then-Service Employees International Union President John Sweeney); see also WEILER, *supra* note 7, at 10 (predicting to less than 10% by 2000). I have commented on this predicted membership decline before. See Christopher D. Cameron, *How the “Language of the Law” Limited the American Labor Movement*, 25 U.C. DAVIS L. REV. 1141, 1142 n.4 (1992) (book review).

Of course, pulling back from the brink of the abyss is one thing; paying for it is something else altogether.¹³ Under the second proviso to section 8(a)(3) of the National Labor Relations Act (NLRA),¹⁴ which was added by the Labor-Management Relations (Taft-Hartley) Act of 1947, a union may collect from non-member “financial core” employees—bargaining unit employees who are entitled to enjoy the full benefits of union representation, but who resist having to pay its full price—a tax consisting only of those expenditures that are “necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative.”¹⁵ But poorly-chosen language in the Supreme Court’s growing body of “agency fee” jurisprudence strongly suggests that the cost of organizing non-union workers flunks this test, and, accordingly, is not tax-

13. The expenditure of agency fees collected by American labor organizations now faces a broad series of attacks in Congress. In Congress are bills to limit the spending of dues paid by full-fledged members of, and not merely dissenting agency fee payers represented by, unions. See, e.g., Paycheck Protection Act, H.R. 2608, 105th Cong., 2nd Sess. (1998); Election Reform in Campaigns Act, H.R. 2573, 105th Cong. § 3 (1997); Worker Right to Know Act, H.R. 3820, 104th Cong., tit. IV (1996). Similar legislation is pending in 26 states, including California, Colorado, Nevada, and Oregon, where referenda are already on voters’ ballots this spring. See Tripp Baltz, *Union Dues: Wyoming Governor Signs “Paycheck Protection” Bill*, 1998 Daily Lab. Rep. (BNA) No. 57, at A-4 (Mar. 25, 1998). Since 1992, Idaho, Michigan, and Nevada have enacted such laws. See *id.*

These measures are reactions to public issue campaigns waged by labor during the 1996 election cycle, when unions spent \$119 million on federal political activity, including the AFL-CIO’s \$35 million investment in House and Senate contests that it targeted in the hope of defeating Republican candidates. See *AFSCME Was Top Contributor in Labor’s \$119 Million Political Spending*, Daily Lab. Rep. (BNA) No. 176, at A-1 (Sept. 11, 1997). After the elections, Republican leaders in Congress responded by holding hearings and introducing legislation designed to curtail unions’ expenditure of such sums in the future, even though the business community outspent labor by a ratio of 7 to 1. See *id.* But see *Business Outspent Labor in ‘96 Elections, CRP Says*, 156 Lab. Rel. Rep. (BNA) 474, 474 (Dec. 8, 1997) (claiming ratio was more than 11 to 1).

14. 29 U.S.C. § 158(a)(3) (1994). The proviso says:

[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Id.

15. *Communications Workers v. Beck*, 487 U.S. 735, 752 (1988) (quotations and brackets omitted); *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984) (adopting same test under Railway Labor Act); see also *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 519 (1991) (adopting “germane to collective bargaining” test for public employee unions under state’s collective bargaining law); *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 121 (1963) (adopting “germane to collective bargaining” test for railway unions).

able to objecting financial core employees in already organized bargaining units.¹⁶

If the Court's expected application of section 8(a)(3) holds up, then Sweeney's organizing programs face the real prospect of failure due to a lack of money to sustain them. For most unions, the sole source of revenue is the dues collected from bargaining unit employees. It has long been established that unions spend too little on organizing to maintain even today's modest union density,¹⁷ and that the organizing they do undertake suffers in so-called "right to work" states,¹⁸ where, by law, financial core employees have an absolute right to become "free riders."¹⁹ So it is not too dire to predict that the inability of AFL-CIO unions to recoup the expense of organizing new members may discourage organizing efforts in the first place. By Sweeney's estimate, it will cost \$300 million merely to stabilize the number of unionized American workers at current levels.²⁰

16. In *Beck*, an NLRA case, the Court agreed with 20 financial core employees challenging the union's use of agency fees "for purposes other than collective bargaining, contract administration, or grievance adjustment." 487 U.S. at 739. Such use was held to be generally unlawful. *See id.* at 745. The Court did not, however, expressly rule on whether each of plaintiffs' targeted expenditures, "such as organizing the employees of other employers," was specifically unlawful. *See id.* at 740. But in *Ellis*, the Court clearly found using agency fees for "organizing efforts. . . aimed toward a stronger union" to be "outside Congress' authorization." 466 U.S. at 451. According to the Court, organizing efforts have only an "attenuated connection with collective bargaining." *Id.* If nothing else, this Article dispels the notion that the effects of union organizing upon collective bargaining are merely "attenuated."

17. For example, during the 1950s, unions organized about 1.0% of the workforce annually. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 229 (1984). By the early 1980s, however, this figure had dropped to just 0.3%, far below the 0.6% that then was required merely to stabilize the union density rate at 20% of the workforce. *See id.* at 241-42. Not coincidentally, at roughly the same time annual expenditures on organizing by unions fell by about 30%. *See* Paula B. Voos, *Trends in Union Organizing Expenditures, 1953-1977*, 38 INDUS. & LAB. REL. REV. 52, 59-60 (1984); *see also* Cameron, *supra* note 12, at 1161-62 (discussing the effect of declining organizing efforts upon the fortunes of labor movement).

18. *See, e.g.,* David T. Ellwood & Glenn Fine, *The Impact of Right-to-Work Laws on Union Organizing*, 95 J. POL. ECON. 250, 266-67 (1987) (finding that, following a state's passage of a "right to work" law, new organizing there falls by roughly 75% within 10 years, and over the long run union membership declines 5% to 18%).

19. *Cf.* Labor Management Relations (Taft-Hartley) Act, 1947, § 14(b), 29 U.S.C. § 164(b) (1994) (stating that the Act does not authorize "agreements requiring membership in a labor organization as a condition of employment").

20. *See Sweeney Calls on State Federations to "Roll Out the Big Guns" for Organizing*, Daily Lab. Rep. (BNA) No. 146, at A-8 (July 30, 1996); *see also* *AFL-CIO Says Membership Loss Stabilized by Organizing 100,000 Members in 1997*, 1998 Daily Lab. Rep. (BNA) No. 20, at D-27 (Jan. 30, 1998) (quoting Sweeney as declaring that new organizing has stopped the "hemorrhaging").

This application of agency fee law is both poor syntax and junk science. It not only gives the imprimatur of the NLRA to the very type of representation without taxation that the second proviso to section 8(a)(3) was designed to avoid,²¹ but also ignores the overwhelming body of empirical evidence supporting precisely the opposite interpretation of the law: that the cost of organizing and attempting to organize non-union firms operating in the same industry as union firms is “necessarily or reasonably incurred” for the purpose of carrying out the effective representation of the typical NLRA bargaining unit.²²

What makes the expense of organizing new workers “necessary or reasonable?” Few workplace issues are of more vital interest to employees than the level of their wages.²³ Most men and women work to earn a living, and when they join labor organizations, do so to improve their earnings.²⁴ Therefore, if it can be established that the wages of bargaining unit employees at a unionized firm are maintained, or improved, by successfully organizing non-unit employees at competing firms, then the cost of attempting to organize those new bargaining units must be seen as an investment that is not only “reasonable” but also “necessary” to the effective representation of the existing bargaining unit.

For the past quarter century, labor economists representing a range of conservative to liberal economic philosophies have published a rich sci-

21. See, e.g., *Beck*, 487 U.S. at 754 (discussing the reasons for Section 8(a)(3)); *Ellis*, 466 U.S. at 446 (same).

22. I hasten to point out that, in making the empirical case for taxing the cost of *intra*-industry organizing to all agency fee payers, I do not mean to give up the next logical argument, which is making the case for taxing the cost of *inter*-industry organizing to the same agency fee payers. In light of existing agency fee law, however, I believe that *intra*-industry organizing expenses present the strongest case for the re-adjustment and re-application of the Supreme Court's agency fee doctrine by the NLRB.

Moreover, it should go without saying that adoption of a same-industry chargeability rule for organizing expenditures would *not* require a union representing employees in multiple industries to calculate and charge its organizing expenses on an industry-by-industry basis. Under the cost-pooling approach accepted by the Court in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), once it is determined that same-industry organizing costs are “germane to collective bargaining,” the union may spread the costs of organizing in each of its industries among all of the represented employees, regardless of the industry in which they are actually employed. See *id.* at 522-24; see also *Finerty v. NLRB*, 113 F.3d 1288, 1291-92 (D.C. Cir.) (following *Lehnert*), *cert. denied*, 118 S. Ct. 558 (1997); cf. *Reese v. City of Columbus*, 71 F.3d 619, 623-24 (6th Cir. 1995) (upholding the chargeability of “extra-unit” litigation expenses to local employees for benefit of state and national employees), *cert. denied*, 117 S. Ct. 386 (1996); *California Knife & Saw Works*, 320 N.L.R.B. 224, 237 (following *Lehnert*), *enforced*, No. 96-1246, slip op. (7th Cir. Jan. 14, 1998).

23. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978).

24. See FREEMAN & MEDOFF, *supra* note 17, at 43 (noting that it is common knowledge that union membership raises wages).

entific literature examining data establishing the relationship between union density and the wage levels of union-represented workers.²⁵ These economists have studied the effects of unionism across dozens of different occupations, geographic areas, industries, and geographic areas within certain industries. Virtually every one of their empirical studies has come to the same conclusion: *there is a positive, statistically significant relationship between the extent of unionization and wages.*²⁶ Simply put, the wages of organized workers are significantly higher than the wages of their non-organized counterparts—a finding that is especially strong when measured within a given industry.²⁷

Moreover, recent data confirm what this quarter-century's worth of studies strongly suggests: that unionization is the cause of higher wages, not that higher wages are the cause of unionization. Responding to a lone but significant dissenting voice among labor economists, Professors Belman and Voos found in 1993 that union employees earn higher wages because unions tend to make a better wage bargain, not because unions tend to organize workers who already have made a better wage bargain.²⁸

Furthermore, just as organizing additional workers tends to increase wages, not organizing them tends to depress wages.²⁹ Another set of published studies, collecting both statistical and anecdotal evidence, has reported that the relatively high wages earned by organized workers are threatened by the continued existence of relatively low wages earned by non-organized workers, especially when earned by employees working in local product markets in the same industry.³⁰

Part I of this Article explores the present state of the Supreme Court's agency fee doctrine. Part II explains why it is necessary to revisit the application of this law to the chargeability of organizing expenses. Part III introduces the leading empirical work by labor economists who have determined the effect of unionization on workers' wage levels. Part III also demonstrates why, if existing authority were properly applied, the cost of intra-industry organizing would have to be considered one "necessarily

25. See *infra* tbl. 1 (summarizing empirical studies discussed herein).

26. See *infra* tbl. 1.

27. See Dale L. Belman & Paula B. Voos, *Wage Effects of Increased Union Coverage: Methodological Considerations and New Evidence*, 46 INDUS. & LAB. REL. REV. 368, 368 (1993).

28. See *infra* notes 96-105 and accompanying text (discussing Belman and Voos's response to Professor Lewis's study).

29. See *infra* notes 106-14 and accompanying text (discussing studies suggesting that low union coverage depresses wages).

30. See Paula B. Voos, *Union Organizing: Costs and Benefits*, 36 INDUS. & LAB. REL. REV. 576, 590 (1983).

or reasonably" incurred by a union in providing effective representation.³¹

I. LOW RIDERS, HIGH RIDERS, AND FREE RIDERS: THE PECULIAR STATE OF AGENCY FEE LAW

Occupying the center of the Supreme Court's agency fee jurisprudence is a clash between competing values of freedom of expression in a democratic society: the importance of adhering to majority rule versus the importance of protecting minority voices. Often this clash arises in the context of public governance, but it can, as here, arise in the cauldron of private association. In a significant class of private associations in which participation is mandated by an overriding public policy, a governing official's private authority to act is based on the premise that, at a given time, most of the members of the constituency have not only given their consent but also expressed their will that certain action be taken. This "mandate" is recognized and enforced by statute. In recognition of the majority's victory, and in furtherance of its freely expressed will, the governing official may compel everyone in the constituency, allies and objectors alike, to pay a tax funding his fair share of the benefits that the governing body will obtain for the group. In compulsory "membership" organizations such as labor organizations, bar associations, and agricultural cartels, compulsion in collecting the tax is necessary to avoid what economists call the problem of the "free rider," or the constituent who accepts group benefits without paying for them. But the concept of majority rule has limits. Although objectors must pay the tax, they also have the right to express themselves by not paying any portion that funds activities unrelated to the stated goals of the legislation that created the group.

During the past forty years, the Supreme Court has issued eleven decisions attempting to resolve the inherent conflict between majority rule and the objectors' rights. The Court did so in three seemingly unrelated, but actually quite similar, contexts involving legislation authorizing the compulsory collection of taxes to pay for group benefits. These decisions

31. A proper application of existing authority in light of the evidence analyzed in this Article should begin with cases now before the Board. *See, e.g.,* *International Bhd. of Teamsters, Local 443 (Connecticut Limousine Serv., Inc.)*, 324 N.L.R.B. No. 105 (Oct. 2, 1997) (remanding to the ALJ for development of full record, the issue of whether organizing expenses are chargeable to objecting agency fee payers). For a general discussion of the use of empirical and other "external" evidence in Supreme Court adjudication, see George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 *LOY. L.A. L. REV.* 545 (1996).

are found in the Court's cases dealing with agency shop fees,³² unified bar fees,³³ and marketing order fees.³⁴ An agency shop case decided under the Railway Labor Act (RLA), *Railway Employees' Department v. Hanson*,³⁵ held that, as long as the required tax is for group activity "germane" to the economic or social goals that the legislature sought to advance, the assertion by dissidents of a right not to pay the tax, and thereby avoid financial association with the group, is without merit.³⁶

Relying upon *Hanson* and its progeny, the Court issued its pronouncement upon the chargeability of agency fees under the NLRA in *Communications Workers v. Beck*.³⁷ Consistent with the legislation creating the right of unions to collect an agency fee found in the second proviso of section 8(a)(3) of the NLRA,³⁸ a union may charge objecting non-member financial core employees only for expenditures that are "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative."³⁹ Notwithstanding differences in the respective statutory schemes,⁴⁰ this test to determine chargeability

32. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 511 (1991) (agency fees under Michigan law governing collective bargaining in public employment); *Communications Workers v. Beck*, 487 U.S. 735, 738 (1988) (agency fees under NLRA); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 294-95 (1986) (agency fees under Illinois law governing collective bargaining in public employment); *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 439 (1984) (agency fees under RLA); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223-24 (1971) (agency fees under Michigan law governing collective bargaining in public employment); *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 115-16 (1963) (agency fees under RLA); *Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961) (same); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 770 (1961) (same); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 238 (1956) (same).

33. *Keller v. State Bar of Calif.*, 496 U.S. 1, 4 (1990) (unified bar fees imposed on licensed attorneys under California law).

34. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2133 (1997) (marketing order fees imposed on tree fruit growers under federal Agricultural Marketing Agreement Act).

35. 351 U.S. 225 (1956).

36. *See id.* (citing *Hanson*, 351 U.S. at 236-38).

37. 487 U.S. 735 (1988).

38. *See* 29 U.S.C. § 158(a)(3) (1994).

39. *Beck*, 487 U.S. at 752 (quotations and brackets omitted).

40. In defending the substantial number of *Beck*-related cases now pending before the National Labor Relations Board, union counsel typically offers the argument that the distinctive legislative histories of NLRA § 8(a)(3) and RLA § 2, Eleventh, respectively, support distinctive treatment of the chargeability question under each statute. Although I respect this argument, I am mindful that the Supreme Court has, on at least one occasion, rejected it. *See Beck*, 487 U.S. at 762 (construing NLRA § 8(a)(3) and RLA § 2, Eleventh as having the same requirements). Although the Supreme Court may—and should—revisit this argument, this Article focuses instead on the empirical evidence that would properly support a factual determination by the National Labor Relations Board, in the exercise of its role as an expert agency charged with interpretation and application of the

under the NLRA is identical to the one approved by the Supreme Court for use in interpreting section 2, Eleventh, of the RLA.⁴¹

Applying the *Beck/Ellis* test, the Court has said:

[O]bjecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.⁴²

As this interpretation suggests, when it comes to the costs of contract negotiation, contract administration, and grievance handling, the Court has been generous in applying the *Beck/Ellis* test. But when it comes to the cost of organizing, the Court has been stingy, if not hostile.

In *Beck*, twenty financial core employees brought suit challenging as a breach of the duty of fair representation the Communications Workers of America's expenditure of the agency fee on, among other things, "organizing the employees of other employers."⁴³ Although the Court did not specifically address the question whether such expenditures satisfied the "necessarily or reasonably" related test, the Justices did affirm the judgment of the United States Court of Appeals for the Fourth Circuit, which, according to the Supreme Court, had determined the cost of "organizing employees in other companies . . . [to be] indisputably *unrelated* to bargaining unit representation."⁴⁴

In *Ellis*, the Court was more to the point. There, a group of financial core employees challenged the Brotherhood of Railway, Airline & Steamship Clerks' agency fee rebate scheme as inadequate under the RLA. The United States Court of Appeals for the Ninth Circuit had found, according to the Justices, that organizing expenses are chargeable to objecting employees "because organizing efforts are aimed toward a stronger union, which in turn would be more successful at the bargaining

NLRA, and reviewable by the federal appellate courts for substantial evidence on the record as a whole, that a union's cost of organizing non-unit employees in the same industry is one "necessarily or reasonably incurred" in performing its representational duties. The *Ellis* Court discussed none of this empirical evidence. See *Ellis*, 466 U.S. at 451-53 (basing "free rider" analysis on meager legislative history only).

41. See 45 U.S.C. § 152, Eleventh (1994); see also *Beck*, 487 U.S. at 754-63 (treating RLA § 2, Eleventh, and NLRA § 8(a)(3) proviso as functional equivalents, rejecting the union's attempt to distinguish between statutory schemes, and adopting the agency fee analysis of *Ellis*).

42. *Ellis*, 466 U.S. at 448.

43. *Beck*, 487 U.S. at 740.

44. *Id.* at 741 (emphasis added).

table.”⁴⁵ The Supreme Court, however, reversed the judgment of the Ninth Circuit and squarely rejected any connection between such expenses and collective bargaining as “attenuated.”⁴⁶ The court concluded: “[W]e think such expenditures are outside Congress’ authorization.”⁴⁷

The result in *Ellis* is curious. By its plain language, the “necessarily or reasonably incurred” standard would seem to contemplate that signing up new recruits is among those “activities or undertakings” that are “normally or reasonably employed” by unions to carry out their duties as exclusive bargaining representatives. Yet the Court summarily dismissed as “attenuated” the relationship of these activities to collective bargaining. It behooves us to understand how this outcome came to be.

II. WHY THE SUPREME COURT’S APPLICATION OF AGENCY FEE DOCTRINE MUST BE REVISITED

If the Supreme Court has all but held that the NLRA forbids taxing the cost of organizing to dissenting agency fee payers, then why revisit the question at all? The answer lies in the need to create a proper record. In decisions applying its agency fee jurisprudence to the cost of union organizing, the Court has made incomplete or inaccurate statements about two very important concepts: what unions actually do, and how their success, or failure, affects the fortunes of their constituents. Therefore, before turning to the empirical case for charging union organizing expenses to agency fee payers, I must first clarify the role of unions under the statute.

A. An Incomplete Picture of What Unions Do

Labor economists have long observed that American collective bargaining has two functions in the workplace. The first function is price-making, or fixing the cost of labor.⁴⁸ The second function is introducing civil rights or requiring that management be conducted by bilaterally-established rule rather than by unilaterally-imposed fiat.⁴⁹ As to the second function, the purpose of collective bargaining is to erect a system of

45. *Ellis*, 466 U.S. at 451.

46. *Id.* at 451-53.

47. *Id.* at 451.

48. See SUMNER H. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 1 (1941). The price-making function embodies what Professors Freeman and Medoff call the “monopoly face” of unionism. See FREEMAN & MEDOFF, *supra* note 17, at 6-7.

49. See SLICHTER, *supra* note 48, at 1. The industrial jurisprudence function embodies what Professors Freeman and Medoff call the “collective voice/institutional response face” of unionism. See FREEMAN & MEDOFF, *supra* note 17, at 7-11.

"industrial jurisprudence."⁵⁰ Building this private system of industrial jurisprudence, which is sometimes called "industrial self-government,"⁵¹ is national labor policy,⁵² and Congress has assigned to the federal courts the job of developing a federal common law of labor relations to protect and nurture it.⁵³

Oddly, the trouble with the Supreme Court's opinion in *Ellis*, and to a lesser degree in *Beck*, is the Court's appreciation of the latter function at the expense of the former. Thus, Justice White's *Ellis* opinion repeatedly cites with approval the union's practice of charging for the cost of "negotiating and administering a collective agreement and in adjusting grievances and disputes";⁵⁴ "negotiating and administering the contract and . . . settling grievances";⁵⁵ and "negotiating and administering a collective-bargaining contract and . . . settling grievances and disputes."⁵⁶ Writing for the Court, Justice White holds chargeable only the expenses that fall easily into these recognizable categories: national policy conventions,⁵⁷ refreshments for union business meetings,⁵⁸ magazines or newsletters discussing contract benefits,⁵⁹ and litigation incident to grievance handling.⁶⁰ These expenses are the stuff of "industrial jurisprudence," the function by which the union erects a system of private self-government at the bargaining table for the purpose of eliminating arbitrary management and maintaining labor peace. It is important language because carrying on the civil rights function gives voice to employee concerns in the workplace. It is natural for unions to insist, and for the Supreme Court to agree, that such costs be borne by everyone in the bargaining unit.

But the civil rights function is only half the picture. In the same opinion, Justice White summarily dismissed the other half, "organizing efforts aimed toward a stronger union," as having merely an "attenuated" relationship with collective bargaining. According to Justice White:

[T]he free rider rationale does not extend this far. . . . [T]he free

50. SLICHTER, *supra* note 48, at 1.

51. *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960).

52. *See* Labor-Management Relations (Taft-Hartley) Act, 1947, § 301(a), 29 U.S.C. § 185(a) (1994).

53. *See* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

54. *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 446 (1984).

55. *Id.* at 447.

56. *Id.* at 448.

57. *See id.* at 448-49.

58. *See id.* at 449-50.

59. *See id.* at 450-51.

60. *See id.* at 453.

rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Non-bargaining unit organizing is not directed at that employee. Organizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues.⁶¹

This reasoning is troublesome because it ignores the price-making function of unionism and the role of industry-based structures in adjusting those prices. Justice White confuses the always quixotic inquiry into legislative intent with the econometric issue of making “free riders” pay. So often, discerning congressional intent is mostly guesswork, whereas calculating the value of what bargaining unit members get for their money is empirically verifiable—and something I seek to do in this Article. Indeed, without intra-industry organizing, there could be no industrial jurisprudence.⁶² As Professor Michael Gottesman notes, what made American unionism so successful during the decades following the enactment of the Wagner Act until the late 1970s was the effective presence of industry-wide unions, a phenomenon made possible in turn by a few stable, dominant firms in each domestic industry.⁶³ In this world,⁶⁴ employers in a given industry who pay the same price for labor are forced to find non-wage means of competing for the business of consumers and vendors. For better or worse, industrial unionism, with its goal of industry-wide price establishment, remains the world of NLRA agency fee law. For the Court to suggest that a union can serve its civil rights function without carrying on its price-making function is to say that a baker can cause a loaf of bread to rise without adding yeast.

B. No Empirical Evidence About the Effects of Union Coverage

Labor economists have published a rich literature documenting the empirical consequences of organizing, and of failing to organize, a given industry.⁶⁵ Unfortunately, this literature has been neither placed before the Court nor judicially noticed by it. If the *Ellis* Court had had the benefit of the econometric research presented here, it could not have

61. *Id.* at 452-53.

62. *See supra* note 51 and accompanying text (discussing industrial jurisprudence and industrial self-government).

63. *See* Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 64 (1993).

64. Although this world is clearly shrinking under the threat of global competition, it is still the world providing the foundation upon which collective bargaining law in general and agency fee doctrine in particular are built. *See id.* at 61.

65. *See infra* tbl. 1 (summarizing the findings of a number of such studies).

concluded that “[o]rganizing money . . . only in the most distant way works to the benefit of those already paying dues.”⁶⁶ Instead, the Court would have realized that organizing costs are justified by the “monetary benefits directly received by” agency fee payers.⁶⁷

What passed for empirical evidence in *Ellis* was the testimony of a single union official who, in 1950, appeared before Congress prior to the enactment of section 2, Eleventh, of the RLA. The Court quoted George Harrison, President of the Brotherhood of Railway, Airline and Steamship Clerks. When asked if getting a “union shop”—the RLA equivalent of a mandatory agency fee tax—would “strengthen your industry-wide bargaining as it presently exists in the railroad industry,”⁶⁸ Harrison replied:

I do not think it would affect the power of bargaining one way or the other. . . . If I get a majority of the employees to vote for my union as the bargaining agent, I have got as much economic power at that stage of development as I will ever have. The man that is going to scab—he will scab whether he is in or out of the union, and it does not make any difference.⁶⁹

Few, if any, union officials operating in private industries governed by the NLRA would say such a thing. So why did George Harrison?

The main reason was that the railway industry was almost fully organized during the period in which Harrison appeared before Congress. By 1950, the year Harrison testified, 75% to 80% of the 1.2 million railway workers then employed in the industry already belonged to one of the railway unions.⁷⁰ In contrast, by 1954, the year that non-agricultural, private sector union density reached its historical zenith, only 38% of the workforce was represented by unions.⁷¹ Unions operating in industries governed by the NLRA never enjoyed, and probably never will enjoy, the power that Harrison’s contemporaries wielded in the interstate transportation industry during the 1950s. Thus, Harrison could afford *not* to concern himself with organizing non-union railway competitors because the job had been mostly completed. Today’s AFL-CIO union officials, however, enjoy no such luxury, as the ambitious organizing agenda of President John Sweeney suggests.

66. *Ellis*, 466 U.S. at 453.

67. Voos, *supra* note 30, at 590.

68. *Ellis*, 466 U.S. at 451 n.12 (citing the testimony of George Harrison).

69. *See id.* 451-52 n.12.

70. *See Communications Workers v. Beck*, 487 U.S. 735, 750 (1988) (citing H.R. Rep. No. 2811, 81st Cong., 4 (1950)).

71. *See WEILER*, *supra* note 7, at 1772 n.4.

Harrison's remarks offer virtually no factual basis for any interpretation of agency fee doctrine, least of all one prohibiting the taxation of organizing expenses. Rather than representing the views of union officials on organizing, his testimony serves as the exception that proves the rule. So, one may ask, what really moved the *Ellis* Court to declare such expenses non-chargeable?

The answer lies in the more fundamental tension between the right of bargaining unit employees in the majority to express themselves through collective action and the asserted right of bargaining unit employees in the minority to object to paying for it. On the surface, a certain irony surrounds compelling objectors to fund the very activities that many of them profess to loathe, namely, forming and joining unions.⁷² Certainly this troubled the Supreme Court. Referring to the union shop authorized by the RLA, Justice White wrote: "[I]t would be perverse to read [section 2, Eleventh] as allowing the union to charge to objecting non-members part of the costs of attempting to convince them to become members."⁷³ Although this is not exactly what union organizers aim to do, one can appreciate the sentiment behind Justice White's syntax. Why force objectors to pay for the expansion of an institution which so many of them resolutely oppose?

The answer is simple: because they lost at the polls. Objecting bargaining unit employees have no more standing to interfere with the winning majority's plans to strengthen its power by expanding into new markets, which is what union organizing is all about, than dissenting voters have to complain about the governing majority's plans, say, to build a new municipal stadium with public funds authorized by a successful referendum. In each case, the losing taxpayers retain the right to say, "I don't like it," but not the right to withhold their financial support from the enterprise authorized by public policy. To accomplish that, they must organize their own governing majority.

72. See *Ellis*, 466 U.S. at 452 (observing that the proposition "what is good for the union is good for the employees" is one that objecting agency fee payers "would strenuously deny").

73. *Id.* at 452 n.13.

III. THE EMPIRICAL EVIDENCE THAT UNION COVERAGE RAISES WAGES

A. General Empirical Evidence

Properly applied, the *Beck/Ellis* test should require the taxation of intra-union organizing expenses to objecting agency fee payers. So we must turn to the empirical data reflecting the single most important factor influencing employees' choice of union representation: wages.

"Few topics," the Supreme Court has recognized, "are of such immediate concern to employees as the level of their wages."⁷⁴ That is why labor economists, who study the effects of labor organizations on the economy, pay close attention to what Professors Richard Freeman and James Medoff of Harvard University call "delivering the goods"—the negotiation of generous wage packages by unions for the workers they represent.⁷⁵

As even the *New York Times* has recognized, the "classic, grinding and time-consuming" method normally employed by the labor movement to deliver these goods is organizing non-union workers.⁷⁶ So under *Beck*, if it can be demonstrated that the wages of bargaining unit employees at a unionized firm are maintained, if not increased,⁷⁷ by successfully organizing non-unit employees at competing firms, then the cost of organizing those new bargaining units must be seen as being not only a "reasonable" investment but also a "necessary" one for the effective representation of the existing bargaining unit.

It is undisputed that union workers earn more than their non-union counterparts. Since World War II, a "seemingly endless number of empirical studies" has estimated the average union wage differential at 15% to 25%.⁷⁸ And since 1969, studies published by Professors Freeman and

74. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978).

75. See FREEMAN & MEDOFF, *supra* note 17, at 5.

76. *Labor Wakes Up*, N.Y. TIMES, Oct. 26, 1995, at A24.

77. There is no analytical basis for distinguishing the effect of unionization on wage gain from its effect on wage stabilization. See Voos, *supra* note 30, at 590. Although the bulk of the empirical literature reviewed herein demonstrates that increased union density causes increased wage levels, union leaders generally frame their main reason for attempting to organize the unorganized workforce in terms of protecting existing union wage scales. See DEREK C. BOK & JOHN T. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 169-70 (1970) (discussing the costs and benefits associated with organizing efforts).

78. RICHARD B. FREEMAN, *LABOR MARKETS IN ACTION: ESSAYS IN EMPIRICAL ECONOMICS* 199 (1989). Labor economists disagree over whether the true average is found at the low or high end of this range. Compare H. Gregg Lewis, *Union Relative*

Medoff, among others, have confirmed not only that the wages of union workers are statistically and significantly higher than the wages of their non-union counterparts, but also that unionism is the primary cause of the difference.⁷⁹

Of course, labor economists of various philosophical schools disagree over whether this union wage premium is good or bad for the economy.⁸⁰ But the same labor economists unanimously agree that the differential is real and statistically significant.⁸¹

The recent leading paper on the subject of the relationship between union density—the percentage of workers whose wages and benefits are established by collective bargaining—and higher wages was published in January 1993 by Professors Dale Belman and Paula Voos⁸² of the University of Wisconsin.⁸³ Professors Belman and Voos reviewed twenty-nine separate studies published about the union wage differential in the United States during the preceding twenty-five years. They found that twenty-seven of the twenty-nine studies reported a positive, statistically significant relationship between union density and higher wages in at least one of the work groups studied. In fact, in eighteen of the twenty-seven studies making positive-and-significant findings, researchers reported neither negative nor insignificant results of any type. Table 1 summarizes these studies and sorts them by the key variable(s) affecting wages: industry, geographical area, occupation, and geography within an industry.

Wage Effects: A Survey 6-7, 9 (1986) [hereinafter Lewis, 1986 Study] (arguing that most studies tend to overestimate the union wage premium and concluding that it is 10% to 15%), with Morgan O. Reynolds, *Making America Poorer: The Cost of Labor Law* 77 (1987) (criticizing Lewis's estimates as too low and noting most economists believe the union wage premium is higher).

79. See *infra* tbl. 1 (reporting these studies).

80. Compare MILTON & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 233-34, 247 (1980) (expressing a neoclassical "Chicago School" viewpoint critical of unions and of the union wage premium for creating wage inequality among workers), and REYNOLDS, *supra* note 78, at 28-30, 65 (expressing a libertarian viewpoint blaming NLRA for encouraging such inequality), with FREEMAN, *supra* note 78, at 214 (expressing traditional pro-union viewpoint concluding that unions are good for the economy and actually reduce wage inequality among workers), and Lewis, *supra* note 78, at 10, 201 (expressing the dissenting viewpoint questioning whether the union wage premium is to blame for wage inequality).

81. See REYNOLDS, *supra* note 78, at 73 (noting the "tremendous disparity" between union and non-union workers' wages).

82. Professor Voos was also a member of the Dunlop Commission on the Future of Worker-Management Relations.

83. See Belman & Voos, *supra* note 27, at 368.

TABLE 1:
PRIOR STUDIES EXAMINING RELATIONSHIP BETWEEN UNION
COVERAGE AND UNION WAGES BY INDUSTRY, OCCUPATION,
GEOGRAPHY, OR GEOGRAPHY WITHIN INDUSTRY⁸⁴

Author (Date)	Positive & Significant Results	Neither Negative nor Insignificant Results
<i>By Industry:</i>		
1. Rosen (1969)	X	X
2. Hendricks (1975)	X	X
3. Gay (1975)	X	
4. Lee (1978)	X	X
5. Kochan (1980)	X	X
6. Donsimoni (1981)	X	X
7. Freeman & Medoff (1981)	X	X
8. Weiss & Mishel (1982)	X	X
9. Antos (1983)	X	X
10. Mellow (1983)	X	X
11. Podgursky (1983)	X	X
12. Moore et al. (1985)	X	
13. Lewis (1986)	X	X
14. Mishel (1986)	X	X
15. Podgursky (1983)	X	X
16. Grant et al. (1987)	X	X
17. Hirsh & Neufeld (1987)	X	X
18. Curme & MacPherson (1991)	X	
<i>By Occupation:</i>		
19. Moore et al. (1985)	X	
20. Lewis (1986)		
<i>By Geography (State or Local Area):</i>		
21. Hendricks (1975)	X	X
22. Holzer (1982)	X	
23. Lewis (1986)		

84. This table, as is the appendix provided *infra*, is substantially adapted from Belman & Voos, *supra* note 27, app., at 376-79.

24. Hirsh & Neufeld (1987)	X	
25. Curme & MacPherson (1991)	X	X
<i>By Geography Within Industry:</i>		
26. Cain et al. (1981)	X	
27. Freeman & Medoff (1981)	X	X
28. Delaney (1985)	X	X
29. Perloff & Sickles (1987)	X	X

My own, less scientific analysis of the fastest-growing segment of the American workforce, Latino workers,⁸⁵ shows just how dramatic the benefits of unionization can be.⁸⁶ According to data compiled by the U.S. Bureau of Labor Statistics for 1996,⁸⁷ across all races and industries, the median weekly paychecks of union workers were thirty-two percent higher than those of non-union workers.⁸⁸ Among Hispanics, the gains were even greater: the median weekly earnings of union Latinos were fifty-one percent higher than those of non-union Latinos.⁸⁹ This was the greatest earnings boost for any ethnic group, giving Latinos the biggest stake of all in successful union organizing.⁹⁰

The general empirical evidence is thus overwhelming: whether measured by industry, occupation, geography, or geography within an industry, the effect of organizing is to increase wage levels for unionized workers. Demand for higher wages is the classic reason why workers choose collective bargaining. It follows that the cost of organizing workers is a "necessary" or "reasonable" cost of undertaking the exclusive bargaining representative's duty to meet this demand.

85. See Christopher David Ruiz Cameron, Survey of U.S. Hispanic Labor 18 (Aug. 1997) (compiled by Matthias H. Wagener) (unpublished manuscript on file with the *Catholic University Law Review*) [hereinafter Hispanic Labor Survey]. From 1980 to 1990, the Latino workforce grew 66.4%. See *id.*

86. See generally Christopher David Ruiz Cameron, *Ounces of Prevention: Mexican Home Remedies for the Common Legal Ailments of Working People* (unpublished manuscript, on file with the *Catholic University Law Review*) (arguing that unionization is the only method proven effective at protecting Latino workers).

87. Unlike the data presented by Professors Belman and Voos, these data have not been controlled for other variables, such as the tendency of some unions to organize workers who already earn higher wages. These variables might exaggerate the gap between union and non-union wages.

88. See Hispanic Labor Survey, *supra* note 85, at 11.

89. *Id.*

90. See *id.*

*B. Specific Empirical Evidence About Local Areas
Within the Same Industry*

The only two studies surveyed by Professors Belman and Voos that failed to find at least one positive and significant relationship between unionization and higher wages were undertaken by Professor H. Gregg Lewis of Duke University. These findings are found in a pair of books by Professor Lewis published in 1963 and 1986.⁹¹ The books rank among the most influential surveys of the research literature investigating this relationship. In his 1963 book, *Unionism and Relative Wages in the United States: An Empirical Inquiry*, Professor Lewis surveyed twenty studies published from 1945 to 1961 and concluded that relative wage gains among union employees were related more to fluctuations in the general economy than to what unions did.⁹² In his 1986 book, *Union Relative Wage Effects: A Survey*, Professor Lewis examined the data from 200 studies published since 1961 regarding unionization and wage levels *by occupation* and reached a much weaker conclusion than had his colleagues: he found the relationship was *positive* if controls for average industry characteristics were not present,⁹³ but *negative* if such controls were present.⁹⁴

These weaker, inconsistent results prompted Professor Lewis to question whether union organizing causes higher wages or whether higher wages cause union organizing. For example, it could be that unions tend to organize workers, such as airline pilots or skilled machinists, who already have some bargaining power to achieve more lucrative wage bargains on their own. As Professor Lewis stated: "I am not convinced that the wage effects picked up . . . [by these studies] are mostly effects of unionism rather than mostly effects of omitted variables."⁹⁵

91. See H.G. Lewis, *Unionism and Relative Wages in the United States: An Empirical Inquiry* (1963) [hereinafter Lewis, 1963 Study]; Lewis, 1986 Study, *supra* note 78.

92. See Lewis, 1963 Study, *supra* note 91, at 9, 191-94.

93. See Lewis, 1986 Study, *supra* note 78, at 128-31. Unfortunately, the statistical significance of Professor Lewis's studies was not reported. See Belman & Voos, *supra* note 27, at 377-78.

94. See Lewis, 1986 Study, *supra* note 78, at 128-31 (summarized in tbl. 1, *supra*, as study number 20). Professor Lewis also reexamined the data *by geography* and reached the opposite conclusion: the relationship was *negative* if controls for average industry characteristics were not present, but *positive* if such controls were present. See *id.* at 131-34 (summarized in tbl. 1, *supra*, as study number 23).

95. Belman & Voos, *supra* note 27, at 369 (quoting Professor Lewis); see also CHARLES CRAYPO, *THE ECONOMICS OF COLLECTIVE BARGAINING: CASE STUDIES IN THE PRIVATE SECTOR* 12 (1986) ("Another argument for minimizing the effects of unions is that high wages themselves may lead to unionization and therefore be the causal factor.").

Professors Belman and Voos decided to look for Professor Lewis's "omitted variables." They observed that "the bulk" of the empirical literature summarized in Table 1 analyzed data about union density and workers' wages without accounting for the peculiar differences in the various industries and geographical areas from which the data were collected.⁹⁶ They allowed that, lacking proper controls for variations in inter-industry and inter-area wage levels, these studies might be vulnerable to the charge that their results captured the effects of "omitted variables," such as the tendency of unions to organize workers who already enjoy high wages, rather than the effects of unionization.⁹⁷

But after studying the problem, Professors Belman and Voos called Professor Lewis's conclusions "unduly pessimistic."⁹⁸

They stated that their main point is that across geographic areas it is only appropriate to use local market industries in studying the effect of local union coverage on union wages, and inappropriate to test the hypothesis with national market industries or, as is often done, to mix local and national market industries in one data set.

Theoretically, there should be a positive relationship between local union coverage and union wages *only in local market industries*. . . . In a national market industry, however, local levels of unionization will not necessarily influence union wages.⁹⁹

Professors Belman and Voos did not prove their theory that a positive relationship between local union coverage and union wages should exist only "in local market industries."¹⁰⁰ But they did offer two sets of evidence demonstrating that the relationship between unionization and high wages is especially significant there.

First, Professors Belman and Voos conducted their own original, empirical research and concluded that wages were positively correlated with the extent of unionization in one important local market industry, but not in one important national market industry. They examined two industries: retail food,¹⁰¹ in which regional supermarket chains tend to operate in local product and labor markets, and aerospace,¹⁰² in which a

96. See Belman & Voos, *supra* note 27, at 369.

97. See *id.*

98. *Id.*

99. *Id.* (emphasis added).

100. Nor do I make such a contention.

101. The retail food industry is dominated by unions affiliated with the United Food & Commercial Workers International (UFCW).

102. The aerospace industry is dominated by unions affiliated with the International

dominant handful of large firms tend to operate in national and international markets in both the public and private sectors. In examining data from these industries, they controlled for the “omitted variables” that might result when data sets from different industries and geographical areas were mixed.

The data showed that the degree of organization among supermarket workers by city had a large influence on wages. In fact, each 10% increase in the union density of the local supermarket labor force produced a 2.2% to 2.3% gain in individual employee’s wages, above and beyond the average union wage premium identified by Professors Freeman, Medoff, and so many others.¹⁰³ This finding contrasted with the data regarding the degree of organization among aerospace workers, which showed a small and statistically insignificant increase in individual employees’ wages.¹⁰⁴

Second, Professors Belman and Voos noted that all four of the twenty-nine studies surveyed that had controlled for the same “omitted variables”—by studying data from local product industries having primarily local bargaining—produced similar results.¹⁰⁵

In sum, the studies surveyed by Professors Belman and Voos offer strong support for the proposition that union organizing expenses are a “necessary,” or at the minimum, “reasonable,” cost of effectively providing workers with perhaps the most sought-after goal of collective representation: higher wages. Moreover, that body of research, together with the original research conducted by Professors Belman and Voos themselves, offers even stronger support for the chargeability of organizing expenses at non-union firms within the same industry.

Association of Machinists & Aerospace Workers (IAM).

103. See Belman & Voos, *supra* note 27, at 372 & n.10.

104. See *id.* at 372. Professors Belman and Voos attributed this differential to the national bargaining power of aerospace employers versus the local and regional bargaining of retail food employers. See *id.* at 372, 376.

105. See generally Glen G. Cain et al., *The Effect of Unions on Wages in Hospitals*, in 4 RES. LAB. ECON. 191 (1981) (summarized in tbl. 1, *supra*, as study number 26) (finding positive-and-significant relationships in hospital industry for all occupational groups in private sector and 3 of 4 groups in public sector); John Thomas Delaney, *Unionism, Bargaining Spillovers, and Teacher Compensation*, 2 ADVANCES IN INDUS. & LAB. REL. 111 (1985) (summarized in tbl. 1, *supra*, as study number 28) (finding positive-and-significant relationships in public school industry for teachers in Iowa and Illinois); Richard B. Freeman & James L. Medoff, *The Impact of the Percentage Organized on Union and Nonunion Wages*, 63 REV. OF ECON. & STAT. 561 (1981) (summarized in tbl. 1, *supra*, as study number 27) (finding positive-and-significant relationships in construction industry for usual hourly and weekly earnings); Jeffrey M. Perloff & Robin C. Sickles, *Union Wage, Hours, and Earnings Differentials in the Construction Industry*, 5 J. LAB. ECON. 174 (1987) (summarized in tbl. 1, *supra* note 84, as study number 29) (finding positive-and-significant relationships in construction industry for male craftsmen in 20 largest SMSAs or by state).

C. Empirical Evidence That Low Union Coverage Depresses Wages

Nearly sixty years ago, the influential labor economist Sumner Slichter observed that union bargaining power has a tendency to erode slowly over time.¹⁰⁶ Unless a union continually engages in the task of organizing the unorganized portion of the workforce, union coverage decreases. Ironically, the roots of this failure are buried in a labor union's very success. Having extracted the inevitable wage gains described in this Article, a union typically forces the organized employer to exercise one, and sometimes both, of two options for recouping his increased labor outlay: raise prices, and pass along the cost of higher wages to buyers; or maintain prices, and absorb the cost of higher wages internally.¹⁰⁷ If the former option is chosen, the higher prices will tend to reduce the employer's share of the product market by opening the market to entry by lower-wage, non-union competitors.¹⁰⁸ If the latter option is chosen, then higher costs will tend to reduce the employer's profit margin, which in turn will discourage reinvestment and expansion.¹⁰⁹ The problem is that both options cause the unionized sector of a given industry to shrink, unless the union continually organizes the unorganized workers in that industry.¹¹⁰ Naturally, the problem is exacerbated in industries facing major structural changes, such as new competition created either by firms overseas¹¹¹ or domestic deregulation.¹¹² In either case, the market may be entered by low-wage-paying firms that are tough to organize—in the former case, because the new entrants are often physically, culturally, and financially beyond the reach of unions' organizing tools; in the latter case, because they are too diffuse, numerous, or quick for unionized industries to integrate successfully.

It is for these reasons that, in interviews with labor leaders, labor economists report that the "major economic impetus" for trying to or-

106. See generally SLICHTER, *supra* note 48, at 345-69 (discussing this concept in the context of competition between union and non-union plants).

107. See *id.* at 345.

108. See *id.* at 345-47.

109. See *id.*

110. See, CRAYPO, *supra* note 95, at 140.

111. See, e.g., Gottesman, *supra* note 63, at 64-65 ("The falloff in union density has coincided with the shrinkage or disappearance of industries in which it is possible for unions to remove labor costs as a ground for employer competition. Foreign competition by producers with much lower labor costs has of course been the most dramatic change . . .").

112. See *id.* at 65 ("[D]eregulation and easier access of new entrants have also furnished increased incentives for cost competition, and have led employers increasingly to attempt to gain a competitive edge through lower labor costs."); see also CRAYPO, *supra* note 95, at 232 (discussing how this problem has affected public and private sector unions).

ganize an industry's unorganized workforce is maintenance or enhancement of wages for those already represented by the union.¹¹³ Although union leaders may have other reasons for wishing to organize new workers, such as a sociopolitical interest in spreading unionism, the reason union leaders—save George Harrison of the railroad industry in the 1950s—most often give is their desire for enhanced bargaining power, which redounds to the benefit of all employees represented by the union.¹¹⁴

Having described how organizing increases wages, I can now test the proposition whether *not* organizing can *depress* wages, by asking whether union officers' reported economic justification for trying to organize new bargaining units has any basis in fact. That is, I am in a position to ask the question whether, on average, the benefits of organizing the unorganized workforce are outweighed by the costs. If so, then the behavior of union officials would seem to be economically "reasonable," thereby supporting the perception among union leaders that failure to engage in such activity is harmful to the central goal of maintaining or enhancing the wages of the organized workforce. In a separate empirical study, Professor Voos undertook such an inquiry.¹¹⁵ Professor Voos collected data and estimated the marginal cost to the pertinent union of organizing one additional employee in twenty manufacturing industries where unions had won NLRB elections between 1964 and 1977. Then, using econometric research on relative wages of the type analyzed in the studies summarized in Table 1, Professor Voos determined the marginal value of the wage benefit to each organized worker. In comparing the two figures, she found that the marginal wage benefit per person organized exceeded the estimated marginal cost of extending union coverage to one additional worker in nineteen of twenty manufacturing industries.¹¹⁶

This is a conservative estimate. According to Professor Voos, the estimated marginal cost of organizing one more worker (measured in 1967 dollars) was between \$176 and \$579.¹¹⁷ In comparing the present value of the marginal benefit in a particular industry with the marginal cost, she

113. Voos, *supra* note 30, at 578 & n.6; *accord* CRAYPO, *supra* note 95, at 68 (noting historic desire of CIO industrial unions to "take labor costs out of competition by negotiating similar economic packages throughout their respective industries"); Freeman, *supra* note 78, at 203, 205 (describing union efforts "to standardize wages in an industry or local product market in order to 'take wages out of competition'").

114. *See, e.g.*, Voos, *supra* note 30, at 578 & n.6.

115. *See id.* at 576.

116. *See id.* at 590.

117. *See id.* at 584.

chose to compare all benefits with the highest estimated marginal cost—\$579.¹¹⁸ Only in the textile industry, where dominant Southern U.S. mills have become infamous for their strenuous and costly resistance to unionization,¹¹⁹ did marginal benefits fail to equal or surpass \$579 per person.¹²⁰

Professor Voos concluded: "It would appear that, on average, the expenditures of [unions] on organizing programs can be justified by the monetary benefits directly received by their [bargaining units]."¹²¹ She then interpreted the data as follows:

[I]t is important to recognize that just as greater bargaining power accrues to unions that organize a larger portion of their industry, unions that permit the erosion of contract coverage in their jurisdiction will face a decline in bargaining power. *Just as an increase in contract coverage enhances bargaining power . . . a decrease in coverage implies that only a smaller wage bargain can be made for the remaining [bargaining unit] members.*¹²²

What does this mean for the chargeability of union organizing expenses to "financial core" employees? At the least, the evidence means that the cost of attempting to organize new bargaining unit workers in the same industry is "reasonable." At the most, the evidence means that organizing non-unit employees is actually "necessary" to effective representation of bargaining unit employees, for the failure to do so jeopardizes existing wage scales whose maintenance is the central goal of labor leaders in the existing bargaining unit. Either way, the *Beck* test is satisfied, because it states that expenses which are "necessarily *or* reasonably incurred" are chargeable.

The results in *Beck* and *Ellis* notwithstanding, there is some reason to believe that the Supreme Court may be persuaded to revisit the issue. Outside the collective bargaining context, the Court has twice found since 1990 that controversial expenses which are germane to the purpose for which a compelled-membership association exists may be taxed to objecting constituents. In *Keller v. State Bar of California*,¹²³ the Court held that a state's interest in regulating the legal profession and in improving the quality of legal services justified the compelled association of

118. See *id.* at 590. This figure also referred to 1967 dollars.

119. See, e.g., *NORMA RAE* (Twentieth-Century Fox 1979) (feature-length motion picture, starring Academy Award-winning actress Sally Field in title role, depicting the difficulties in organizing Southern textile mill).

120. See Voos, *supra* note 30, at 590 n.37.

121. *Id.* at 590.

122. *Id.* (emphasis added).

123. 496 U.S. 1 (1990).

licensed attorneys, and hence, the expenditure of their mandatory bar dues for a wide range of non-ideological purposes.¹²⁴ Likewise, in *Glickman v. Wileman Brothers & Elliott, Inc.*,¹²⁵ the Court held that Congress's interest in eliminating competition in order to stabilize prices in certain discrete commodities markets justified the compelled association of growers, handlers, and processors of California tree fruits, and hence, the expenditure of their mandatory assessments to fund the cost of generic advertising to consumers.¹²⁶ *Glickman* especially suggests that the cost of expanding a compelled association's product market—in that case, for California-grown nectarines, peaches, and plums—should be chargeable over the objections of objecting constituents of the association. Inside the collective bargaining arena, a union's attempt to charge to objecting agency fee payers the cost of expanding unionism to new workers is really no different.

IV. CONCLUSION

"Few topics are of such immediate concern to employees as the level of their wages."¹²⁷ Among U.S. workers, for example, none are more immediately concerned about their wages than Latinos, who for years have found themselves at the bottom of the wage scale. As long as organized labor remains America's sole significant institution capable of improving wages, then workers of all backgrounds who want to enrich their standards of living will have to turn to unions for assistance with their wage bargains. Proper application of the Supreme Court's agency fee jurisprudence, by authorizing unions to charge to all represented employees the cost of organizing new bargaining units in the same industry, would help unions carry out this job more effectively and put some muscle behind AFL-CIO President John Sweeney's pledge to make organizing fashionable once again.

124. See *id.* at 13-14.

125. 117 S. Ct. 2130 (1997).

126. See *id.* at 2133.

127. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978).

V. APPENDIX: PRIOR STUDIES EXAMINING RELATIONSHIP BETWEEN
UNION COVERAGE AND UNION WAGES BY INDUSTRY, GEOGRAPHY,
OR GEOGRAPHY WITHIN INDUSTRY

Author (Date)	Comment(s)
<i>By Industry</i>	
1. Sherwin Rosen, <i>Trade Union Power, Threat Effects and the Extent of Organization</i> , 36 REV. ECON. STUD. 185 (1969).	Positive and significant
2. Wallace Hendricks, <i>Labor Market Structure and Union Wage Levels</i> , 13 ECON. INQUIRY 401 (1975).	Positive and significant in 8 of 9 occupations. For janitors and laborers, positive and significant , controlling for union coverage in SMSA.
3. Robert S. Gay, <i>The Impact of Unions on Relative Real Wages: New Evidence on Effects Within Industries and Threat Effects</i> (1975) (unpublished University of Wisconsin Ph.D. dissertation).	Positive and significant for operatives and craft workers; positive but insignificant for laborers.
4. Lung-Fei Lee, <i>Unionism and Wage Rates: A Simultaneous Equations Model with Qualitative and Limited Dependent Variables</i> , 19 INT'L ECON. REV. 415 (1978).	Positive and significant
5. THOMAS A. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS: FROM THEORY TO POLICY AND PRACTICE (1980).	Positive and significant
6. Marie-Paul Donsimoni, <i>Union Power and the American Labour Movement</i> , 13 APPLIED ECON. 449 (1981).	Positive and significant.
7. Richard B. Freeman & James L. Medoff, <i>The Impact of Percentage Organized on Union and Nonunion Wages</i> , 63 REV. ECON. & STAT. 561 (1981).	Positive and significant for manufacturing workers.
8. Leonard Weiss & Lawrence Mishel, <i>The Sources of Union Power</i> (1982) (unpublished University of Wisconsin paper).	Positive and significant.
9. Joseph R. Antos, <i>Union Effects on White-Collar Compensation</i> , 36 INDUS. & LAB. REL. REV. 461 (1983).	Positive and significant.

10. Wesley Mellow, <i>Employer Size, Unionism, and Wages</i> , in RESEARCH IN LABOR ECONOMICS 253 (Joseph D. Reid, Jr. ed., 1983).	Positive and significant , controlling for firm size, personal characteristics, industry, occupation, and location.
11. Michael Podgursky, <i>Unions and Family Income Equality</i> , 18 J. HUM. RESOURCES 574 (1983).	Positive and significant for 3 coverage ranges above 40%, compared to 0 to 20%, union density.
12. William J. Moore et al., <i>The Effect of the Extent of Unionism on Union and Non-union Wages</i> , 6 J. LAB. RES. 21 (1985).	<ul style="list-style-type: none"> a. Positive and significant with or without controls for occupation. b. Disaggregating by type of worker, positive and significant only for non-craft workers. c. Disaggregating by geography, state-specific industrial coverage is insignificant, but national coverage is significant, controlling for occupational coverage.
13. H. GREGG LEWIS, UNION RELATIVE WAGE EFFECTS: A SURVEY 1-10 (1986).	Positive (significance not reported) for 5 different definitions of coverage.
14. Lawrence Mishel, <i>The Structural Determinants of Union Power</i> , 40 INDUS. & LAB. REL. REV. 90 (1986).	Positive and significant compared to union density less than 40%.
15. Michael Podgursky, <i>Unions and Family Income Equality</i> , 18 J. HUM. RESOURCES 574 (1983).	Positive and significant.
16. Kenneth E. Grant et al., <i>Canadian Union-Nonunion Wage Differentials</i> , 41 INDUS. & LAB. REL. REV. 93 (1987).	Positive and significant.
17. Barry T. Hirsh & Jon Neufeld, <i>Nominal and Real Union Wage Differentials and the Effects of Industry and SMSA Density: 1973-83</i> , 22 J. HUM. RESOURCES 138 (1987).	<ul style="list-style-type: none"> a. Positive and significant, controlling for SMSA coverage in all 10 years studied for production workers in manufacturing or production workers in non-union manufacturing. b. Positive and significant, controlling for SMSA coverage in 5 of 10 years studied for non-production workers.
18. Michael A. Curme & David A. MacPherson, <i>Union Wage Differentials and the Effects of Industry and Local Union Density: Evidence from the 1980s</i> , 12 J. LAB. RES. 419 (1991).	Positive and significant for production workers; positive but insignificant for non-production workers.

<i>By Occupation:</i>	
19. William J. Moore et al., <i>The Effect of the Extent of Unionism on Union and Non-union Wages</i> , 6 J. LAB. RES. 21 (1985).	<p>a. Positive and significant for industrial coverage for pool sample; positive and significant for 4 of 7 separate years.</p> <p>b. Disaggregating by type of worker, positive and significant only for craft workers; insignificant for non-craft workers.</p> <p>c. Disaggregating by geography, state-specific occupational coverage is significant, but national coverage is insignificant, controlling for industrial coverage.</p>
20. H. GREGG LEWIS, <i>UNION RELATIVE WAGE EFFECTS: A SURVEY 1-10</i> (1986).	Positive , if controls for average industry characteristics not present; negative if present; significance not reported.
<i>By Geography (State or Local Area):</i>	
21. Wallace Hendricks, <i>Labor Market Structure and Union Wage Levels</i> , 13 ECON. INQUIRY 401 (1975).	Positive and significant relationship of SMSA coverage to wages for janitors and laborers, controlling for coverage in an industry.
22. Harry J. Holzer, <i>Unions and the Labor Market Status of White and Minority Youth</i> , 35 INDUS. & LAB. REL. REV. 392 (1982).	Positive and significant for white and black men age 16-24, and for white men age 25-64; positive but insignificant for older black men.
23. H. GREGG LEWIS, <i>UNION RELATIVE WAGE EFFECTS: A SURVEY 1-10</i> (1986).	Negative if controls for average industry characteristics not present; positive if present, significance not reported.
24. Barry T. Hirsh & Jon Neufeld, <i>Nominal and Real Union Wage Differentials and the Effects of Industry and SMSA Density: 1973-83</i> , 22 J. HUM. RESOURCES 138 (1987).	<p>a. Positive and significant in 7 of 10 years studied for production workers in manufacturing. For production workers in non-manufacturing, insignificant in most years, but negative and significant in 1 year.</p> <p>b. Insignificant for non-production workers in most years, but negative and significant in 1 year.</p>
25. Michael A. Curme & David A. MacPherson, <i>Union Wage Differentials and the Effects of Industry and Local Union Density: Evidence from the 1980s</i> , 12 J. LAB. RES. 419 (1991).	Positive and significant in 5 of 9 cases, controlling for industry coverage.

<i>By Geography Within Industry</i>	
26. Glen G. Cain et al., <i>The Effects of Unions on Wages in Hospitals</i> , in RESEARCH IN LABOR ECONOMICS 191 (Ronald G. Ehrenberg ed., 1981).	Positive and significant for all occupation groups in the private sector, and for 3 of 4 in the public sector; 1 of 4 was positive but insignificant .
27. Richard B. Freeman & James L. Medoff, <i>The Impact of Percentage Organized on Union and Nonunion Wages</i> , 63 REV. ECON. & STAT. 561 (1981).	Positive and significant effects on both usual hourly earnings and usual weekly earnings.
28. John Thomas Delaney, <i>Unionism, Bargaining Spillovers, and Teacher Compensation</i> , in 2 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 111-42 (David B. Lipsey ed., 1985).	Positive and significant effect on usual-weekly earnings for national sample, and on average annual salaries in Iowa and Illinois.
29. Jeffrey M. Perloff & Robin C. Sickles, <i>Union Wage, Hours, and Earnings Differentials in the Construction Industry</i> , 5 J. LAB. ECON. 174 (1987).	Positive and significant.

